

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: December 8, 2003

TO : Rosemary Pye, Regional Director  
Region One

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: New England Regional Council of Carpenters  
Case 1-CC-2712

560-2575-6700  
560-2575-6713

This case was submitted for advice as to: (1) whether the Union's filing of comments with a state environmental agency in opposition to the licensing of a construction project, with a secondary object, may be found to be coercive in violation of Section 8(b)(4); and (2) if so, whether to defer a decision as to whether the comments can be charged as a violation of the Act, consistent with BE & K,<sup>1</sup> pending the state environmental agency's ruling on the license.

We conclude that the filing of comments in opposition to the licensing of a construction project, solely for a secondary object, can be considered Section 8(b)(4) coercion. We see no reason to defer action pending the state environmental agency's ruling on the license. We conclude that although the Union's comments lack apparent substance, we cannot say conclusively that they are baseless, given the broad scope of an environmental agency's discretion in licensing matters. However, we conclude that there is sufficient evidence to assert that the filing of the comments was nevertheless an unfair labor practice because they would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome."<sup>2</sup>

<sup>1</sup> BE & K Construction Co. v. NLRB, 536 U.S. 516, 170 LRRM 2225 (2002).

<sup>2</sup> The test suggested *in dictum* by a majority of the Court in BE & K. See Id. at 536-537.

FACTS

The Pickering Wharf Realty Trust (the Trust), owned by the Rockett family, is the developer of Pickering Wharf, a complex of waterfront-area condominiums and commercial properties in Salem, Massachusetts. Pickering Wharf is adjacent to a national historic area that draws about 800,000 visitors per year.

About five years ago, the Trust began a project to build a hotel at Pickering Wharf. In April 2000, the Trust applied for a license from the Massachusetts Department of Environmental Protection ("the DEP") to build a 99-room hotel, including a restaurant, pub, retail space and bank. A license from the DEP was required because the hotel was to be built on land that is a filled-in tidal area.

In May 2000, a group of ten citizens from a competing hotel filed comments with the DEP opposing the granting of the license.<sup>3</sup> When the DEP granted the license, the group initiated a series of hearings and appeals of the DEP's ruling at the DEP and in the Massachusetts state court system. None of these appeals was found to have merit. The Trust sued the group of citizens in federal district court under the Sherman Anti-trust Act in connection with their opposition to the construction license. The case was finally settled in 2002. The Charged Party in this case, the New England Regional Council of Carpenters ("NERCC" or "the Union"), did not file comments on the original license or participate in this litigation.

The DEP issued a license to the Trust in May 2002. On December 17, 2002, the Trust applied to the DEP for a license amendment to increase the number of hotel rooms to 108 and to increase the height of the building. The DEP granted the amended license on December 20, 2002. NERCC filed no comments in opposition to issuance of the amended license.

On March 13, 2003, the Trust applied for a second amended license to allow it to convert the top floors of the building from hotel to residential use (to build eight residential units), reduce the number of hotel rooms from 108 to 99, provide 16 parking spaces for the residential units, and increase the footprint of the building by 44 feet. On April 23, 2003, the DEP published notice of the

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<sup>3</sup> Under the DEP licensing procedures, if a group of at least ten citizens files a comment, the group may obtain standing to become an intervenor and appeal the DEP's decision.

Trust's request and announced a 30-day period for public comment.

The general contractor for the project, Village Construction ("VC"), which is also owned by the Rockett family, began construction of the hotel in April 2003, using a non-union contractor, C. White Marine, for the pile driving work.

On May 14, 2003, VC filed a Section 8(b)(4) charge against NERCC in Case 1-CC-2711, alleging that NERCC engaged in secondary picketing and other unlawful activity to obtain pile driving and other work from VC. In the Region's investigation of that case, VC project manager Eric Rumpf testified that from May 12 through May 16, 2003, NERCC members engaged in activities including photographing the license plates of vehicles driving into or leaving the construction site, trespassing, blocking ingress and egress to the site with their bodies and pounding on vehicles that tried to enter, while holding signs and leaflets critical of the Rockett family. The object of this conduct was alleged to be NERCC's dispute with C. White Marine. Rumpf testified that this conduct continued even after VC established a reserved gate system. Rumpf further testified that on May 13, NERCC representative Steve Falvey told Rumpf that he would be "relentless" with Mike Rockett until he (Falvey) was successful in getting this to be a Union job. Rumpf also testified that Falvey told him that if Mike Rockett would commit in front of witnesses to give certain work to EMR, Inc., a union drywall contractor in Salem, then he would be satisfied and that "all this would go away."<sup>4</sup>

VC withdrew the charge on May 19, 2003, prior to a Regional determination of its merits, based on NERCC's representations that it would limit its picketing to the primary gate and conduct itself in a lawful manner.<sup>5</sup>

On May 23, 2003, the last day to comment on the Trusts' application for a second amended license, a group of ten "residents of Massachusetts" filed comments with the

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<sup>4</sup> The Union did not present any witnesses in response to that charge or the charge involved in this case.

<sup>5</sup> A similar charge against NERCC Pile Drivers Local Union No. 56 (Case 1-CC-2710) was filed and withdrawn on the same dates as the charge in Case 1-CC-2711. It is unclear if the Region would have found the charges meritorious, due to an unresolved issue about a possible tainted gate.

DEP expressing concerns about the proposed amendment. The group filing the comments was composed solely of NERCC representative Falvey, staff of the Union, and Union members and their families.<sup>6</sup> The comments stated in relevant part:

We the undersigned residents of Massachusetts wish to inform the [DEP] of significant issues we believe should be considered regarding the proposed license amendment application proposed by the Pickering Wharf Hotel located at 23 Congress St. and 223-23 Derby Street, Salem, MA.

We have significant concerns as to the intent of the applicant to provide public access to the waterfront. We believe the increased residential portion which is sought will impact the water dependent use of this waterfront property in a negative way. This project will further restrict the remaining access to the harbor of small craft owners and recreational fishermen and we believe that granting this amendment will lead to further deterioration of this tidal area. We believe that allowing a permanent residential use within this development will change the approved concept in a way which requires more data before an amendment can be granted. We also wish to obtain from this entity a commitment to quality construction and respect for the waterfront environment, which is not evident from associated commercial construction and rental operations which they direct in Salem and Marblehead.

On May 30, 2003, the Mayor of Salem met with representatives of VC and NERCC to try to resolve the dispute. VC owner Hilary Rockett, Jr., testified that at the meeting he asked NERCC representative Nick DiGiovanni why the Union had submitted its frivolous comment to the DEP. According to Rockett, DiGiovanni responded that he would "do whatever he had to do or use any means to get the

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<sup>6</sup> NERCC's counsel alleges that NERCC had e-mailed the identical comments to DEP on May 22 on behalf of various Salem residents and small business owners who had concerns about the project. After learning that e-mailing comments might not be sufficient to preserve their right to intervene, and in light of the fact that May 23 was the last day of the comment period, Falvey sent the comments again on May 23, using whoever was available to sign the comments in person, including Union staffers.

job." NERCC denies that the conversation took place as recounted by Rockett.

Rockett testified that unless it withdraws its comments, NERCC may appeal a decision by the DEP to issue an amended license, causing further delay and disruption to the construction project, which was scheduled to be completed by April 2004.

VC filed the instant charge on May 30, 2003, alleging that NERCC engaged in unlawful secondary activity by filing "sham" and meritless comments with the DEP that were meant to delay and impede the hotel project in order to coerce VC to cease doing business with non-union contractors.

VC argues that NERCC's purpose in filing the comment was *not* to impact the amended petition or to have the building plans adjusted to conform to environmental concerns. Rather, it alleges NERCC's *sole* purpose in filing the comment was to force VC to cease doing business with non-union contractors and to do business with union contractors. As evidence of the secondary objective, VC relies on the statements of NERCC representatives that they would be "relentless" until union contractors obtained the work at the hotel project, that "all of this would go away" if Rockett would commit to give certain work to a union contractor, and that NERCC had submitted the comments to the DEP because it would use "any means" to get the job. VC also points out that the comments were filed one week after NERCC had engaged in other unlawful secondary conduct. It notes that NERCC had never participated in the prior proceedings at the DEP or shown any concern about these environmental problems before it demanded the work, although there had been years of litigation over the DEP license.

To demonstrate that NERCC's comments are objectively baseless, VC argues that the requested license amendment to include eight residential units in the top floor of the already-approved hotel structure would not affect public access to the waterfront and that the historic area already has about 800,000 visitors per year. As to the alleged negative impact on the "water-dependent use of this waterfront property," the DEP found, in granting the original license, that the project is not located in a water-dependent use zone and that the project was a "non water-dependent use project." The addition of residential units to the top floor of the hotel would not affect access to the water or have any effect on watercraft. VC argues that NERCC's assertion that other projects directed by VC failed to show a commitment to quality construction and respect for the waterfront environment is unsubstantiated

and in conflict with approvals the project has received from the Salem planning boards.

NERCC argues that, as a matter of law, environmental petitioning for a secondary object should never be considered Section 8(b)(4) coercion, even if it is entirely baseless. In any event, NERCC argues that its petitioning was reasonably based. It contends that the developer significantly changed the nature of the project originally approved by requesting to add the residential units and accompanying parking spaces. Instead of a building housing transients, the project would house permanent residents who are much more likely than hotel guests to maintain their own boats in the area. NERCC alleges that the increased use of and congestion in the waterways at the very least raises serious issues for public consideration, and, as noted in the comment, the requested amendment "requires more data before an amendment can be granted."

#### ACTION

We conclude that the Union's environmental comments cannot be considered baseless, but there is sufficient evidence to assert that they would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome," such that their filing was nevertheless an unfair labor practice.

At the outset, we note that the Union's conduct, lobbying or petitioning the DEP, is activity of the type generally protected by the First Amendment. In Petrochem Insulation, Inc.,<sup>7</sup> the employer filed a lawsuit against certain unions, alleging Sherman Antitrust and RICO violations because of their alleged campaign of filing environmental impact objections to projects on which the employer was a contractor and intervening in state permit proceedings to oppose the issuance of permits. In defending against an allegation that the lawsuit violated Section 8(a)(1), the employer contended that the unions' lobbying actions were not protected under the Act because they had the unlawful secondary object of coercing project owners to cease doing business with the employer and other non-union contractors.<sup>8</sup> In considering whether the unions' actions violated Section 8(b)(4)(ii)(B), the Board in Petrochem stated that governmental lobbying by a union is

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<sup>7</sup> 330 NLRB 47 (1999).

<sup>8</sup> Id. at 49.

activity protected by the First Amendment.<sup>9</sup> Accordingly, in order to avoid First Amendment problems that would result if the unions' petitioning were found to constitute Section 8(b)(4)(ii)(B) coercion, the Board followed the Supreme Court's analysis in Edward J. DeBartolo<sup>10</sup> and concluded that the conduct was lawful and protected by the Act.<sup>11</sup> Therefore, the fact that the Union's activity in this case may have a secondary object does not necessarily cause it to lose the protection of the First Amendment.

However, the Board in Petrochem left open the question of whether the petitioning could be found unlawfully coercive for 8(b)(4) purposes if the unions had filed, or threatened to file, "sham" petitions with a secondary objective. The Board concluded that because there was no support for the employer's contention that the unions filed their petitions and objections "without regard to their merits," the conduct did not violate Section 8(b)(4)(B).<sup>12</sup>

The Supreme Court has given recent guidance as to circumstances in which governmental petitioning would not enjoy First Amendment protection and thus might be considered an unfair labor practice. In BE & K, the Court reconsidered the circumstances under which the Board could find a concluded suit to be an unfair labor practice.<sup>13</sup> Previously, in Bill Johnson's Restaurants,<sup>14</sup> the Court held that in order for the Board to halt the prosecution of an *ongoing* lawsuit, it had to find that the suit lacked a reasonable basis in fact or law and had been brought for a retaliatory motive.<sup>15</sup> However, it said that a *completed* lawsuit could be charged as an unfair labor practice under

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<sup>9</sup> Id. at 50.

<sup>10</sup> Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council, 485 U.S. 568, 580 (1988) (Section 8(b)(4)(ii)(B) does not cover peaceful handbilling because such activity, unlike picketing, accomplishes its goal by the persuasive force of the ideas it conveys rather than by coercion, intimidation or restraint.)

<sup>11</sup> 330 NLRB at 50.

<sup>12</sup> 330 NLRB at 50.

<sup>13</sup> 536 U.S. at 527.

<sup>14</sup> 461 U.S. 731 (1983).

<sup>15</sup> Id. at 731, 742-743.

a lesser, alternative standard. Namely, where the litigation was unsuccessful (resulted in a judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise shown to be without merit) and was filed with a retaliatory motive.<sup>16</sup> Although the Board had followed that standard for many years, the Court in BE & K reconsidered and rejected it because the class of lawsuits sanctioned would include a substantial portion of suits that involved "genuine petitioning" protected by the Constitution.<sup>17</sup> The Court held that the Board can no longer rely on the fact that the lawsuit was ultimately unsuccessful, but must determine whether the lawsuit, regardless of its outcome on the merits, was reasonably based.<sup>18</sup> The Court explained that this Constitutional protection is warranted whenever a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal.<sup>19</sup> In such cases, petitioning, the Court said, is "genuine both objectively and subjectively."<sup>20</sup>

However, the Court left open the question of whether, and under what circumstances, a lawsuit that was reasonably based as an objective matter might nevertheless be considered an unfair labor practice. As to that question, a majority of the Court, in *dictum*, indicated that a reasonably based lawsuit might be considered unlawful if the suit would not have been filed "but for" a motive to impose litigation costs on the defendant, regardless of the outcome of the case, in retaliation for protected activity.<sup>21</sup>

1. The Union's conduct was unlawful under BE & K.

The Court in Bill Johnson's articulated the basic standards for determining whether a lawsuit is baseless.

<sup>16</sup> Id. at 747, 749.

<sup>17</sup> 536 U.S. at 532.

<sup>18</sup> Id. at 532-537.

<sup>19</sup> Id. at 534 (emphasis in original).

<sup>20</sup> Id.

<sup>21</sup> Id. at 536-537. Two of those Justices opined that the decision in BE & K implies that the Court, in an appropriate case, will rule that the Board can never find a reasonably based lawsuit to be unlawful. Id. at 537-538 (Scalia, concurring).

It explained that while "genuine disputes about material historical facts should be left for the state court, plainly unsupported inferences from the undisputed facts and patently erroneous submissions with respect to mixed questions of fact and law may be rejected."<sup>22</sup> Further, just as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous."<sup>23</sup> Thus, a lawsuit can be deemed baseless only if it presents unsupported facts or unsupported inferences from facts, or if it depends upon "plainly foreclosed" or "frivolous" legal issues.

In the instant case, we cannot conclude that the Union's comments were baseless. The comments contain very general, rather vague claims regarding potential negative environmental impacts. Although the comments sound quite contrived and have no clear merit, it would be difficult to prove they are baseless, especially given the nature of the comments and the environmental context. It is difficult to apply a baselessness concept in the context of a discretionary, environmental policy issue, particularly when dealing with public comments. It is not a legal proceeding, applying precedent and articulated legal standards. DEP has wide discretion in determining when the granting of a license would serve the public interest. Public attitudes and concerns about environmental impacts can in themselves be persuasive.<sup>24</sup> Thus we cannot say that the comments could not in some respect influence the DEP's decision.

Since we cannot conclusively say that the comments lacked any reasonable basis, their filing cannot be found to be a violation unless it can be shown that they would not have been filed "but for a motive to impose costs on the defendant, *regardless of the outcome of the suit.*"<sup>25</sup> We conclude that the instant case meets that test.

<sup>22</sup> Bill Johnson's, 461 U.S. at 746, n.11.

<sup>23</sup> Id.

<sup>24</sup> Even if perhaps not as to the merits, as to the need for further studies or public education before a license should be granted.

<sup>25</sup> BE & K, 536 U.S. at 536-537.

The Union here essentially admits that the *only* reason for its actions, including filing the comments with the DEP, was to force VC to use union contractors. On May 13, NERCC representative Falvey told Rumpf that he would be "relentless" with Mike Rockett until he (Falvey) was successful in getting this to be a Union job. Rumpf also testified that Falvey told him that if Mike Rockett would commit in front of witnesses to give certain work to EMR, Inc., a union drywall contractor in Salem, then he would be satisfied and that "all this would go away." VC owner Hilary Rockett, Jr., testified that at a meeting with the Mayor to resolve the environmental dispute, he asked NERCC representative DiGiovanni why the Union had submitted its frivolous comment to the DEP. According to Rockett, DiGiovanni responded that he would "do whatever he had to do or use any means to get the job." Although the Union's first two statements were made before it filed comments with the DEP, they are persuasive evidence of the Union's motives in filing the comments. The third statement confirms that all of the Union's actions were part of an effort to coerce VC to hire a union contractor.

The Union provided no evidence suggesting a non-coercive motive for its filing of the comments or that they had any real interest in the outcome. It presented no witnesses, and, as to the third statement, merely denied in its position statement Rockett's description of that conversation. The Union does claim that it filed the comments on behalf of various Salem residents and small business owners who had concerns about the project -- implying that it was representing interests beyond its labor dispute with VC when it filed the comments. However, when asked to provide further evidence that the Union represented these Salem residents in pursuit of broader goals, the Union stated that the comments were signed only by Union members and their families. Thus, it would appear that the Union did not file the comments in pursuit of broader interests, but merely enlisted the assistance of Union staff and family members to meet the DEP filing requirements in its multi-pronged effort to coerce VC.

The evidence therefore demonstrates that the Union's filing was not genuine petitioning. There is no evidence that the Union had any true environmental concerns. It had no economic stake in the environmental issues, and none of the issues in the comments relate to issues that the Union is in fact concerned about as an organization. The

comments were intended solely to impose costs and delay<sup>26</sup> on VC until it was coerced into using a union contractor.

Therefore, we conclude that there is sufficient evidence to assert that the filing of the comments, which cannot be proven baseless, was nevertheless an unfair labor practice because they would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome."

2. The Union's conduct did not have an illegal object within the meaning of Bill Johnson's footnote 5.

We would not argue that the Union's conduct is unlawful because it was filed solely for an illegal 8(b)(4) object. The Union's comments to the DEP do not have an illegal object because if the Union is successful in its petitioning, the result would not be unlawful under the Act.

In Bill Johnson's, the Supreme Court explained that the Board may enjoin suits -- regardless of merit -- that have "an objective that is illegal under federal law" or that are preempted by the Board's jurisdiction.<sup>27</sup> The Board has applied a footnote 5 analysis to enjoin suits or grievance proceedings whose objective is contrary to established case law. In Long Elevator,<sup>28</sup> the Board found a footnote 5 "illegal object" violation where a union sought in a grievance proceeding an unlawful construction of a facially valid contract clause.<sup>29</sup> The respondent union in

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<sup>26</sup> Although the Court in BE & K framed its "but for" test in terms of imposing "costs of the litigation process," we are not concerned that in the present case the costs involved are not necessarily litigation costs in a strict sense. Other costs that stem from the filing, such as the cost of responding to the comments and the delay or frustration of a construction project, can be intentionally imposed in order to coerce. There is no reason that the "but for" test would not include these other costs.

<sup>27</sup> 461 U.S. at 737, n.5.

<sup>28</sup> 289 NLRB 1095 (1988), enf'd 902 F.2d 1297 (8<sup>th</sup> Cir. 1990).

<sup>29</sup> The Board has also applied a footnote 5 analysis to enjoin unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act.

that case filed a grievance on behalf of an employee who was disciplined for refusing to work behind a lawfully erected reserve gate. The Board found that the union's grievance, if successful, would have effectively transformed a facially valid no-strike clause into an unlawful hot cargo provision. The Board reasoned that although the provision in question might have been "entirely susceptible of a lawful meaning," the meaning claimed for it by the respondent made the grievance an attempt to enforce an unlawful provision, and therefore unlawful under footnote 5.<sup>30</sup>

The Board has also used a footnote 5 analysis in Section 8(b)(1)(A) cases involving illegal fines or the charging of a nonmember for use of grievance procedure.<sup>31</sup> This is consistent with the Supreme Court's reference, in footnote 5, to cases involving unions which sought judicial enforcement of fines against nonmembers for post-resignation conduct.<sup>32</sup>

The Board applies the same analysis to condemn the filing of proceedings with the secondary objective of coercing neutral employers to cease doing business with

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<sup>30</sup> 289 NLRB at 1095 n.2. Specifically, the union sought a construction of the no-strike clause that would require the primary employer to acquiesce in any work stoppage by its employees in support of the union's dispute with a neutral employer. So interpreted, the clause would constitute a *de facto* hot cargo provision in violation of Section 8(b)(4)(ii)(A).

<sup>31</sup> See, e.g., Laundry Workers Local 3 (Virginia Cleaners), 275 NLRB 697 (1985); American Postal Workers Union (USPS), 277 NLRB 541 (1985); Electrical Workers Local 113 (Pride Electric, Inc.), 283 NLRB 39 (1987); Sheet Metal Workers Local 9 (Concord Metal, Inc.), 297 NLRB 86 (1989).

<sup>32</sup> Booster Lodge No. 405 IAM (The Boeing Co.), 185 NLRB 380 (1970), enf'd in part, 459 F.2d 1143 (D.C. Cir. 1972), aff'd 412 U.S. 84 (1973); Granite State Joint Board (International Paper Box Machine Co.), 187 NLRB 636 (1970), enf. den. 446 F.2d 369 (1st Cir. 1971), rev'd 409 U.S. 213 (1972).

non-union contractors. In Nevins Realty Corp.,<sup>33</sup> Nevins canceled a contract with a cleaning subcontractor whose employees the respondent union (SEIU) represented and gave the work to a second, non-SEIU subcontractor. The second contractor refused to hire the predecessor's employees or maintain the SEIU's wages and benefits level. In response, the union filed a grievance against Nevins under a contract covering a unit of Nevins employees (a superintendent and helper) alleging a violation of that agreement's subcontracting clause. The union sought in its grievance to apply the contractual terms and conditions of employment to the subcontractor's employees.<sup>34</sup> The Board found a Section 8(b)(4)(ii)(B) violation against the union for coercing Nevins -- a neutral employer -- in furtherance of the union's dispute with the second cleaning contractor. The Board found that the subcontracting clause in the Nevins agreement pertained only to the subcontracting of work that the Nevins bargaining unit exclusively performed, and thus the union's contractual claim had no lawful work preservation purpose but was filed "to satisfy the [union's] interests elsewhere."<sup>35</sup>

In the instant case, although it is clear that the Union's motive in filing comments with the DEP was to interfere with the business relationship between VC and its non-union contractor, we cannot say that the Union sought an object that is unlawful under the Act. If successful in its petitioning, the Union's comments would result in a delay in the licensing process or, at most, a denial of the amendment to the environmental license, not a cessation of VC's business relationship with the non-union contractor. In contrast to the cases where the Board found a footnote 5 violation, neither result is contrary to Board law or otherwise unlawful under the Act.

<sup>33</sup> SEIU Local 32B-32J (Nevins Realty Corp.), 313 NLRB 392 (1993).

<sup>34</sup> Id. at 398.

<sup>35</sup> Id. at 392. See also Emery Air Freight, 278 NLRB 1303 (1986), remanded in rel. part 820 F.2d 448 (D.C. Cir. 1987), where the Board concluded that the union's grievance was an attempt to force a neutral employer to cease doing business with a non-union contractor, and that its filing violated Section 8(b)(4)(ii)(B). We note that the DC Circuit remanded the case for further Board consideration as to whether the Union's motive was in fact secondary. The case subsequently settled.

In sum, absent settlement, the Region should issue a complaint alleging that the Union violated Section 8(b)(4) by filing the environmental comments with the DEP. The Region should argue that the filing was unlawful because the comments were filed with a secondary object and would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome."

B.J.K.